

May 2004

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 5

Notice & Time Requirements

5.1 Service of Process in Child Protective Proceedings

Presumption of legitimacy.

On pages 124-125, delete the case summary of *In re Montgomery* and the **Note** regarding *In re KH*. In *KH*, the Michigan Supreme Court overruled *Montgomery* insofar as it held that a court may make a paternity determination during a child protective proceeding.

CHAPTER 5

Notice & Time Requirements

5.2 Establishing Paternity

Procedure for establishing paternity in a child protective proceeding.

At the bottom of page 126, insert the following case summary before the summary of the *CAW* case:

The Supreme Court held that the Michigan Court Rules do not permit a biological father to participate in a child protective proceeding where a legal father exists. *In re KH*, ___ Mich ___, ___ (2004), overruling *In re Montgomery*, 185 Mich App 341 (1990). In *KH*, the FIA filed a petition to terminate the parental rights of Tina and Richard Jefferson to four children. During a bench trial, the parties testified that Tina and Richard were legally married during each child's conception and birth and were still married at the time of trial. Based on DNA test results admitted at trial, the referee determined that another man, Lagrone, was the biological father of three of the children. *KH, supra* at ___. Lagrone then filed a motion seeking a ruling that Richard Jefferson was not the father of the three children. Tina Jefferson objected to the motion, arguing that as a putative father Lagrone did not have standing to establish paternity in a child protective proceeding. The trial court granted Lagrone's motion to establish paternity. The children's lawyer-guardian ad litem appealed. *KH, supra* at ___.

MCR 5.921(D)* permitted a putative father to be identified and given notice of court hearings only where the minor child had no father. Therefore, if a father already existed pursuant to MCR 5.903(A)(4), a putative father could not be identified or given notice. *KH, supra* at ___.

*Now MCR 3.921(C). Although *KH* was decided under the court rules in effect prior to May 1, 2003, the Court notes that the analysis and outcome of the case are the same under the current court rules. *KH, supra* at ___, n 1.

Because Tina and Richard were legally married at the time of each minor's conception and birth, the children had a legal father and no other man could be identified as a putative father unless the minors were determined to be "born out of wedlock." MCR 5.903(A)(1)* defined a "child born out of wedlock" as a child "conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage." *KH, supra* at ____.

*The definition of "child born out of wedlock" was incorporated into the definition of "father" in MCR 3.903(A)(7)(a).

Lagrone argued that the three children were judicially determined to be "born out of wedlock" when the referee determined that Lagrone was the biological father of the children. The Court looked to the Paternity Act as the legislatively provided mechanism for establishing paternity. The Court concluded:

"[A] determination that a child is born out of wedlock must be made by the court before a biological father may be identified in a child protective proceeding.

"Under either version of the court rule, MCR 5.921(D) or MCR 3.921(C), a prior out-of-wedlock determination does not confer *any type* of standing on a putative father. Rather, the rules give the trial court the discretion to provide notice to a putative father, and permit him to establish that he is the biological father by a preponderance of the evidence. Once proved, the biological father is provided fourteen days to establish a legally recognized paternal relationship.

"*Nothing in the prior or amended court rules permits a paternity determination to be made in the midst of a child protective proceeding.* Rather, once a putative father is identified in accordance with the court rules, the impetus is clearly placed on the putative father to secure his legal relationship with the child as provided by law. If the legal relationship is not established, a biological father may not be named as a respondent on a termination petition, the genetic relationship notwithstanding." [Emphasis added.] *KH, supra* at ____.

In *KH*, the record contained evidence that the presumption of legitimacy had been rebutted. During the course of the proceedings, Tina and Richard Jefferson testified that Richard was not the children's father. Richard also testified that he did not wish to participate in the proceedings, which, the Court concluded could reasonably be construed as an indication that Richard was prepared to renounce the benefit afforded to him by the presumption of legitimacy and to not claim the children as his own. *KH, supra* at _____. However, since the trial court did not make a finding on whether the presumption of legitimacy was rebutted, the Court remanded to the trial court for such a determination. The Court concluded:

“If Mr. Lagrone had been . . . identified[as a putative father], and elected to establish paternity as permitted by MCR 5.921(D)(2)(b), the out-of-wedlock determination made in the child protective proceeding could serve as the prior determination needed to pursue a claim under the Paternity Act. *Girard* [*v Wagenmaker*, 437 Mich 231 (1991)].

“Accordingly, this case is remanded to the trial court for such a determination. If the court finds that the presumption of legitimacy was rebutted by clear and convincing evidence from either parent that the children are not the issue of the marriage, the court may take further action in accordance with MCR 5.921(D).” *KH, supra* at ____.

CHAPTER 7

Preliminary Hearings

7.4 Respondents' Right to Counsel

Effective May 1, 2004, MCR 3.977(I) was amended. Beginning near the middle of page 180, replace the quote of MCR 3.977(I) with the following quote:

“(I) Respondent’s Rights Following Termination.

“(1) *Advice.* Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a) The respondent is entitled to appellate review of the order.

(b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcript and record the attorney requires to appeal.

(c) A request for the assistance of an attorney must be made within 14 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if the respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).

(d) The respondent has the right to file a denial of release of identifying information, a revocation of a denial of release, and to keep current the respondent’s name and address as provided in MCL 710.27.

“(2) *Appointment of Attorney.*

(a) If a request is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent’s request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.

(b) In a case involving the termination of parental rights, the order described in (I)(2) and (3) must be entered on a

form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

"(3) *Transcripts*. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense."

The relevant SCAO forms have been amended to conform to the amended court rule. See SCAO Form JC 44 and JC 84. For further information, see SCAO Administrative Memorandum 2004-02, April 1, 2004.

CHAPTER 18

Hearings on Termination of Parental Rights

18.13 Required Advice of Rights

Effective May 1, 2004, MCR 3.977(I) was amended. Beginning near the bottom of page 389, replace the quote of MCR 3.977(I) with the following quote:

“(I) Respondent’s Rights Following Termination.

“(1) *Advice.* Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a) The respondent is entitled to appellate review of the order.

(b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcript and record the attorney requires to appeal.

(c) A request for the assistance of an attorney must be made within 14 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if the respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).

(d) The respondent has the right to file a denial of release of identifying information, a revocation of a denial of release, and to keep current the respondent’s name and address as provided in MCL 710.27.

“(2) *Appointment of Attorney.*

(a) If a request is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent’s request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.

(b) In a case involving the termination of parental rights, the order described in (I)(2) and (3) must be entered on a

form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Order Appointing Counsel," and the court must immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

"(3) *Transcripts*. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense."

The relevant SCAO forms have been amended to conform to the amended court rule. See SCAO Form JC 44 and JC 84. For further information, see SCAO Administrative Memorandum 2004-02, April 1, 2004.

CHAPTER 21

Appeals

21.4 Filing Requirements

Effective May 1, 2004, MCR 7.204(A)(1) was amended. Replace the quotation of MCR 7.204(A)(1) near the middle of page 451, beginning with the following quote:

“(1) An appeal of right in a civil action must be taken within

(a) 21 days after entry of the judgment or order appealed from;

(b) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief, if the motion was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period;

(c) 14 days after entry of an order of the family division of the circuit court terminating parental rights, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period; or

(d) another time provided by law.

“If a party in a civil action is entitled to the appointment of an attorney and requests the appointment within 14 days after the final judgment or order, the 14-day period for the taking of an appeal or the filing of a postjudgment motion begins to run from the entry of an order appointing or denying the appointment of an attorney. If a timely postjudgment motion is filed before a request for appellate counsel, the party may request counsel within 14 days after the decision on the motion.”